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Public Prosecutor v Bayati Heidar

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–85–04 OF 2015
TENGKU MAIMUN, IDRUS HARUN AND ABDUL KARIM JJCA
20 SEPTEMBER 2016

C *Criminal Law — Dangerous drugs — Trafficking in dangerous drugs — Trial court acquitted and discharged respondent — Appellant appealed against decision — Whether respondent required to disclose his defence at earliest opportunity — Whether respondent raised reasonable doubt on element of knowledge — Whether appellant proved its case beyond reasonable doubt — Dangerous Drugs Act 1952 s 39B(1)(a) & (2)*

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The respondent was charged for the offence of drug trafficking under s 39B(1)(a) of the Dangerous Drugs Act 1952 and punishable under s 39B(2) of the same Act. The appellant's version of the case was that the respondent was detained at the KLIA by SP5 and brought to the Serdang Hospital where X-ray taken showed foreign objects in his intestine. The respondent excreted 67 capsules which were later kept inside six plastic bags. After the respondent was discharged, SP5 handed the six bags containing the capsules to the investigating officer ('SP6') who later sent the capsules to the chemist ('SP2'). SP2 confirmed that the capsules contained 393g of methamphetamine. In his defence, the respondent contended that the capsules contained medicine and it was one Reza who asked him to swallow the capsules because according to Reza, the medicine was very expensive and in some countries it was prohibited. At the conclusion of the trial, the learned trial judge found that the respondent had raised a reasonable doubt as to the element of knowledge of the dangerous drugs, thus a vital ingredient of 'possession' had not been proven beyond reasonable doubt. The respondent was acquitted and discharged, hence this appeal. The appellant submitted that the law requires the respondent to disclose his defence and the particulars of Reza at the earliest opportunity, which he failed to do. In defence, the respondent submitted that the findings of the learned trial judge should not be disturbed as His Lordship had considered the defence in totality of all the evidence adduced by the appellant.

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I **Held,** allowing the appeal; setting aside the order of the High Court; and convicting and sentencing respondent to death:

(1) The learned trial judge erred in concluding that the respondent had raised a reasonable doubt on the element of knowledge. The respondent's version that he was asked by Reza to swallow the capsules was not put to

SP5 and SP6. In fact Reza's name did not surface during the prosecution's case. Reza was only mentioned at the defence case. For want of evidence relating to the particulars of Reza, the defence that Reza told the respondent about the capsules containing medicine and thus the respondent had no knowledge of the drugs, could not amount to the truth of that version. The doubt entertained by the learned trial judge was an imaginary doubt unrelated to the evidence. On the totality of the evidence, the appellant had proved its case against the respondent beyond reasonable doubt (see paras 23 & 25–27).

[Bahasa Malaysia summary

Responden dituduh bagi kesalahan mengedar dadah di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah s 39B(2) Akta yang sama. Versi kes perayu adalah bahawa responden ditahan di KLIA oleh SP5 dan dibawah ke Hospital Serdang di mana X-ray yang diambil menunjukkan objek asing di dalam usus besar. Responden mengumuhkan 67 kapsul yang kemudiannya disimpan di dalam enam beg plastik. Selepas responden dibebaskan, SP5 menyerahkan enam beg mengandungi kapsul kepada pegawai penyiasat ('SP6') yang kemudiannya menghantar kapsul-kapsul tersebut kepada ahli kimia ('SP2'). SP2 mengesahkan bahawa kapsul mengandungi 393g methamphetamine. Dalam pembelaannya, responden berhujah bahawa kapsul mengandungi ubat dan ia adalah seorang yang bernama Reza yang menyuruh dia menelan kapsul-kapsul tersebut kerana mengikut Reza, ubat adalah terlalu mahal dan di setengah negara ia adalah dilarang. Pada akhir perbicaraan, hakim perbicaraan yang bijaksana mendapati bahawa responden telah membangkitkan keraguan munasabah terhadap unsur pengetahuan dadah berbahaya tersebut, oleh itu bahan penting 'possession' tidak dibuktikan melampaui keraguan munasabah. Responden dilepaskan dan dibebaskan, maka rayuan ini. Perayu berhujah bahawa undang-undang mengkehendaki responden mendedahkan pembelaannya dan butir-butir mengenai Reza pada peluang terawal, yang mana dia gagal melakukannya. Dalam pembelaan, responden berhujah bahawa dapatan hakim bicara yang bijaksana tidak patut dicampur tangan kerana Yang Arif telah mempertimbangkan pembelaan secara keseluruhan terhadap kesemua keterangan yang dikemukakan oleh perayu.

Diputuskan, membenarkan rayuan; mengetepikan perintah Mahkamah Tinggi; dan menyabitkan dan menjatuhkan hukuman mati ke atas responden:

(1) Hakim perbicaraan yang bijaksana juga tersilap dalam memutuskan bahawa responden telah membangkitkan keraguan munasabah atas unsur pengetahuan. Versi responden bahawa dia disuruh oleh Reza untuk menelan kapsul-kapsul tersebut tidak dikemukakan kepada SP5 dan SP6. Sebenarnya nama Reza tidak muncul semasa kes pihak pendakwaan. Reza hanya disebut pada kes pembelaan. Untuk keterangan berkaitan butir-butir mengenai Reza, pembelaan bahawa Reza

memberitahu responden mengenai kapsul-kapsul tersebut mengandungi ubat dan oleh itu responden tidak mengetahui mengenai dadah tersebut, tidak merupakan kebenaran versi tersebut. Keraguan yang dipertimbangkan oleh hakim perbicaraan yang bijaksana adalah keraguan rekaan yang tidak berkait kepada keterangan. Atas keseluruhan keterangan, perayu telah membuktikan kesnya terhadap responden melampaui keraguan munasabah (lihat perenggan 23 & 25–27).]

Notes

For cases on trafficking in dangerous drugs, see 4(1) *Mallal's Digest* (5th Ed, 2015) paras 976–980.

Cases referred to

Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209, FC (refd)
Megat Halim bin Megat Omar v PP [2008] MLJU 647; [2009] 1 CLJ 154, CA (refd)
Mohd Azrin bin Che Meh lwn Pendakwa Raya [2012] 1 MLJ 450, CA (refd)
PP v Datuk Tan Cheng Swee & Anor [1980] 2 MLJ 276, FC (refd)
PP v Saimin & Ors [1971] 2 MLJ 16 (folld)
PP v Badrulsham bin Baharom [1988] 2 MLJ 585 (refd)
Pendakwa Raya lwn Sulaiman bin Saidin [2010] 3 MLJ 383, CA (folld)
Teng Howe Sing v PP [2009] 3 MLJ 46; [2009] 3 CLJ 733, FC (refd)

Legislation referred to

Criminal Procedure Code s 182A, Fourth Schedule, paras 13(2), 15
Dangerous Drugs Act 1952 First Schedule

Appeal from: Criminal Trial No 45A-24 of 2010 (High Court, Shah Alam)

Nurshafini bt Mustafha (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Ridha Abdah Subri (Ridha & Rai) for the respondent.

Tengku Maimun JCA (delivering judgment of the court):

[1] This is the prosecution's appeal against the decision of the High Court in acquitting and discharging the respondent at the end of the defence case. We had unanimously allowed the appeal. We now give our reasons.

THE PROSECUTION'S CASE

[2] The charge against the respondent reads:

That you on 3 October till 6 October 2013 at the toilet in Ward 7C, Hospital Serdang in the District of Sepang in the state of Selangor did traffic in a dangerous drugs, to wit 393 grammes of Methamphetamine; and thereby committed an offence under Section 39B(1)(a) of the Dangerous Drugs Act 1952 and punishable under Section 39B(2) of the same Act.

[3] The respondent was detained at KLIA by ASP Ahmad Nor a/l Nai ('SP5') and his team. A body search on the respondent and his baggage inspection revealed nothing incriminating. However, the respondent's refusal to drink aroused the suspicion of SP5 compounded with the fact that throughout the one-hour he was in the examination room of the airport, the respondent was sitting upright.

[4] The respondent was brought to the Serdang Hospital where X-ray taken showed foreign objects in his intestine. He was then detained at Ward 7C. The ward was guarded by a chief sentry who was on duty with few other sentries on a rotation basis. The duty of the chief sentry was to inform SP5 of the excretion of any substance by the respondent.

[5] Within three days, the respondent excreted 67 capsules. The three chief sentries on duty when the respondent excreted the capsules were Insp Basar bin Safar ('SP1'), ASP Tan Chong Ling ('SP3') and ASP Sivananthan a/l Vanivelu ('SP4').

[6] A total of six plastic bags containing the capsules were received by SP5. SP5 kept the plastic bags with each capsule bearing his markings in his steel cabinet. After the respondent was discharged, SP5 handed the packets containing the capsules to the investigating officer Mohd Firdaus bin Ali ('SP6') who sent the capsules to the chemist Suhana binti Ismail ('SP2') for analysis.

[7] Upon analysis SP2 confirmed that the capsules contained 393g of methamphetamine. Methamphetamine is listed under the Schedule to the Dangerous Drugs Act 1952 ('the Act').

FINDINGS AT THE END OF THE PROSECUTION'S CASE

[8] The learned trial judge found that the prosecution had miserably failed to prove that the capsules excreted by the respondent were the same capsules analysed by SP2 and finally produced in court.

[9] The finding was premised on the fact that there were contradictions between the evidence of the chief sentries and SP5 and in the evidence of SP5

himself in respect of the drug exhibits. The retrieval of the drugs by way of the respondent's excretion was held to be an intrusive search and was not in compliance with s 13(2) of the Fourth Schedule to the Criminal Procedure Code as it was not conducted by a government medical officer or a medical officer. There was also no search list being prepared and signed by the seizing officer on the excreted items and countersigned by the respondent under s 15 of the Fourth Schedule and there was no handing over list from the chief sentries to SP5 to signify the handing over of the items excreted. Further, no photographs of the excretion were produced to support the oral evidence of the chief sentries and SP5 on the excretion of the capsules by the respondent.

[10] The respondent was thus acquitted and discharged without being called upon to enter his defence.

[11] Aggrieved by the decision of the learned trial judge, the prosecution appealed to this court. The appeal was allowed. This court ordered the respondent to enter his defence.

THE DEFENCE

[12] In his evidence given under oath, the respondent stated that he worked as a taxi driver in Iran but his pay was not enough to sustain the cost of living. He then embarked on a business of buying and selling imitation and cheap shoes and clothing in a night market in Tehran. The money to start the business was loaned to him by the taxi owner, Reza and the products were sourced from Dubai and Malaysia.

[13] Prior to his arrest, the respondent had travelled to Malaysia twice, ie in June and September 2009 and each time he stayed for about 2–3 days. The respondent confirmed the prosecution's version that on 3 October 2009 he was detained and taken to the hospital. He admitted swallowing more than 50 capsules but his version was that the capsules contained medicine. It was Reza who had suggested that the respondent brought some medicine for athlete muscle building to Malaysia to settle his loan. He had to swallow the capsules because according to Reza, the medicine was very expensive and in some countries it was prohibited. He informed the police of Reza but the police did not allow him to contact Reza and his mobile phone was seized. While he admitted that he had excreted the capsules, he stated that he was in a semi-conscious state and the police did not at any time show him the capsules excreted.

FINDINGS AT THE CONCLUSION OF THE CASE

[14] The learned trial judge found that the investigating officer failed to investigate any part of the statement of the respondent, in particular in respect of Reza. His Lordship found that the defence was not an afterthought and that the prosecution did not challenge the respondent's narration of his trip to Malaysia, including his business at the night market. The learned trial judge accepted the respondent's explanation that he swallowed the capsules to conceal the medicine and believed the respondent when he conceded that he might be carrying prohibited items but certainly not dangerous drugs.

[15] Accordingly, the learned trial judge found that the respondent had raised a reasonable doubt as to the element of knowledge of the dangerous drugs. Hence, a vital ingredient of 'possession' had not been proven beyond reasonable doubt. The respondent was thus acquitted and discharged. Dissatisfied with the decision, the prosecution appealed to this court.

THE APPEAL

[16] The only issue raised in the appeal was whether the learned trial judge was correct in deciding that the respondent had raised a reasonable doubt on the element of knowledge and that consequently, the prosecution had not proved its case beyond reasonable doubt.

[17] Learned DPP submitted that the learned trial judge erred in his finding that the defence has raised a reasonable doubt on the element of knowledge and that the respondent's version was not challenged by the prosecution due to the fact that the prosecution failed to conduct any investigation on the respondent's version. In ruling that the defence was not an afterthought defence, learned DPP argued that the learned trial judge failed to take into account the respondent's failure to inform the police at the time of his arrest or soon after about Reza. Learned DPP relied on *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209; *Public Prosecutor v Badrulsham bin Baharom* [1988] 2 MLJ 585 and *Teng Howe Sing v Public Prosecutor* [2009] 3 MLJ 46; [2009] 3 CLJ 733 to support her argument that the law requires the appellant to disclose his defence and the particulars of Reza at the earliest opportunity, which he failed to do.

[18] For the respondent, learned counsel submitted that the findings of the learned trial judge should not be disturbed as His Lordship had considered the defence in totality of all the evidence adduced by the prosecution, in particular pertaining to the issue of chain of evidence and the identity of the drug exhibits.

A OUR DECISION

[19] Given that this court had allowed the prosecution's appeal against the acquittal and discharge of the respondent at the end of the prosecution's case, we were of the view that it was no longer necessary for us to consider the issue B of the chain of evidence and the exhibits. In calling the respondent to enter his defence it must necessarily mean that this court had found a prima facie case and that this court had overruled the High Court on the issue of exhibits. Based on the earlier finding of this court, the respondent can be convicted on the prima facie evidence if he failed to raise a reasonable doubt on the prosecution's C case.

[20] We took the same approach as was taken by this court in *Pendakwa Raya lwn Sulaiman bin Saidin* [2010] 3 MLJ 383 which states:

D [27] Sebelum merumuskan isu atau isu-isu yang berbangkit dalam rayuan ini, kami mendapati perlu untuk mengulangi bahawa tertuduh telah dipanggil untuk membela diri setelah mahkamah ini, dalam rayuan terdahulu, mengetepikan keputusan hakim bicara di akhir kes pendakwaan. Sehubungan dengan itu, kami mendapati tiada keperluan bagi kami untuk menimbangkan semula isu-isu yang telah diputuskan oleh mahkamah ini terdahulu mengenai isu-isu yang telah E dibangkitkan di akhir kes pendakwaan, kecuali jika terdapat keterangan-keterangan baru yang dibangkitkan oleh pihak pembelaan yang boleh menimbulkan keraguan munasabah ke atas kes pendakwaan.

(See also *Mohd Azrin bin Che Meh lwn Pendakwa Raya* [2012] 1 MLJ 450.)

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[21] In determining whether the prosecution had proven its case beyond reasonable doubt, the learned trial judge must, at the conclusion of the trial consider all the evidence (see s 182A of the Criminal Procedure Code). In this regard the learned trial judge must reasonably, properly and judicially consider G the defence in the light of the prosecution case and come, on the totality of the evidence before it, to a correct decision (see *Public Prosecutor v Datuk Tan Cheng Swee & Anor* [1980] 2 MLJ 276).

[22] As to the meaning of 'reasonable doubt', the following definition is H quoted in *Public Prosecutor v Saimin & Ors* [1971] 2 MLJ 16:

It is not a mere possible doubt, because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which after the entire comparison and consideration of all the evidence leaves the minds of the jurors in that condition that they cannot say they I feel an abiding conviction to a moral certainty of the truth of the charge.

It has again be said that 'reasonable doubt' is the doubt which makes you hesitate as to the correctness of the conclusion which you reach, if under oaths and upon your consciences, after you have fully investigated the evidence and compared it in all its parts, you say to yourself I doubt that he is guilty, then it is a reasonable doubt. It is

a doubt which settles in your judgment and finds a resting place there. Or as sometimes said, it must be a doubt so solemn and substantial as to produce in the minds of the jurors some uncertainty as to the verdict to be given. A reasonable doubt must be a doubt arising from the evidence or want of evidence and cannot be an imaginary doubt or conjecture unrelated to evidence.

[23] Having perused the appeal record, we agreed with learned DPP that the learned trial judge erred in concluding that the respondent had raised a reasonable doubt on the element of knowledge. The respondent's version that he was asked by Reza to swallow the capsules was not put to SP5 and SP6. In fact Reza's name did not surface during the prosecution's case. Reza was only mentioned at the defence case.

[24] The law requires every aspect of the defence including a belated defence to be evaluated by the learned trial judge. However the defence must not be looked at in isolation but must be looked at as a whole and tested against the prosecution's case. The learned trial judge ought to have investigated the defence by comparing it in all its parts to the prosecution's case. The appellant's version that he informed the police of Reza which was only raised in his evidence in court was clearly an afterthought defence, was suspicious and inherently improbable (see *Megat Halim bin Megat Omar v Public Prosecutor* [2008] MLJU 647; [2009] 1 CLJ 154). And since Reza was not revealed by the respondent to SP5 at the airport or to the investigating officer SP6 as the person responsible for asking him to swallow the capsules, how then was it possible for the police to investigate Reza?

[25] The respondent admitted that he swallowed more than 50 capsules before travelling to Malaysia and he also admitted that he had excreted the capsules in the hospital. For want of evidence relating to the particulars on Reza, the defence that Reza told the respondent about the capsules containing medicine and thus the respondent had no knowledge of the drugs, cannot amount to the truth of that version.

[26] Applying the principle in *Public Prosecutor v Saimin & Ors*, we found that the defence had failed to raise a reasonable doubt on the prosecution's case. In our view, the doubt entertained by the learned trial judge was an imaginary doubt unrelated to the evidence.

CONCLUSION

[27] On the totality of the evidence, we found that the prosecution had proved its case against the respondent beyond reasonable doubt. We therefore

unanimously allowed the prosecution's appeal. The order of the High Court was set aside and substituted with an order of conviction. We sentenced the respondent to death.

Appeal allowed; order of High Court set aside; respondent convicted and sentenced to death.

Reported by Dzulqarnain Ab Fatar